affirmative public interest benefits.[120] In summary, the Applicants must demonstrate that the transaction will not violate or interfere with the objectives of the Communications Act or Commission rules, and that the predominant effect of the transfer will be to advance the public interest.

49. The Commission's analysis of public interest benefits and harms includes, but is not limited to, an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles.[121] While an antitrust analysis, such as that undertaken by the DOJ in this case, focuses solely on whether the effect of a proposed merger "may be substantially to lessen competition,"[122] the Communications Act requires the Commission to make an independent public interest determination, which includes evaluating public interest benefits or harms of the merger's likely effect on future competition.[123] In order to find that a merger is in the public interest, therefore, the Commission must "be convinced that it will enhance competition."[124]

---

telecommunications technologies); at 3211-13, paras. 108-12 (imposing additional restrictions to ensure that AT&T-TCI not exert influence over the trustee of the Sprint PCS trading stock or receive economic benefit during the divestiture period to mitigate the possibility that AT&T would not compete fully with Sprint in CMRS markets during such period, and also to ensure that Sprint's ability to raise capital to build out its network in this new service would not be adversely affected); *WorldCom/MCI Order*, 13 FCC Rcd at 18130-34, paras. 188-93 (addressing allegations that, as a direct result of the merger, the merged entity would cease providing long distance and local service to residential customers).

120 *See, e.g., AT&T/TCI Order*, 14 FCC Rcd at 3229-30, para. 147 (finding consumer benefit through the company's intention and increased ability and incentive to provide facilities-based competition in local telecommunications markets); *Applications of Puerto Rico Telephone Authority, Transferor, and GTE Holdings (Puerto Rico) LLC, Transferee, For Consent to Transfer Control of Licenses and Authorizations Held by Puerto Rico Telephone Company and Celulares Telefónica, Inc.*, File Nos. 03373-03384-CL-TC-98, Memorandum Opinion and Order, 14 FCC Rcd 3122, 3149, at para. 58 (1999) (concluding that consumers would benefit from private ownership of the island's principal local exchange service provider by a well-financed and experienced company, along with the buyer's commitment to substantial infrastructure investment).

121 Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies arrive at based on antitrust law. *See FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure."). *See also WorldCom/MCI Order*, 13 FCC Rcd at 18034, para. 13 (*citing RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply.")).

122 15 U.S.C. § 18.

123 *See WorldCom/MCI Order*, 13 FCC Rcd at 18032-33, para. 12; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, para. 2.

124 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, para. 2.

50. In the *AT&T/TCI Order*, we explained that competition in the telecommunications industry is shaped not only by antitrust rules, but also by regulatory policies that govern interactions among industry participants.[125] For example, no industry can be effectively governed by antitrust rules unless some other rules specify the industry participants' property rights. In telecommunications markets the ground rules necessary to permit competition are frequently supplied by regulatory policy. Accordingly, our public interest evaluation necessarily encompasses the "broad aims of the Communications Act."[126] These broad aims include, among other things, the implementation of Congress's pro-competitive, deregulatory national policy framework designed to open all telecommunications markets to competition, the preservation and advancement of universal service, and the acceleration of private sector deployment of advanced services.[127] Our public interest analysis may also entail assessing whether the merger will affect the quality of telecommunications services or will result in the provision of new or additional services to consumers.[128] In making these assessments, the Commission considers the trends within, and needs of, the telecommunications industry, as well as the factors that influenced Congress to enact specific provisions of the Communications Act.[129]

51. Following passage of the 1996 Act, local telecommunications markets have been undergoing a transition to competitive markets, so a transaction may have predictable yet dramatic consequences for competition over time even if the immediate effect is more modest. Therefore, when a transaction is likely to affect local telecommunications markets, our statutory obligation requires us to assess future market conditions. In doing so, the Commission may rely upon its specialized judgment and expertise to render informed predictions about future market conditions and the likelihood of success of individual market participants.[130]

---

125 *AT&T/TCI Order*, 14 FCC Rcd at 3169, para. 14

126 *See, e.g., AT&T/TCI Order*, 14 FCC Rcd at 3168-69, para. 14; *WorldCom/MCI Order,* 13 FCC Rcd at 18030-31, para. 9.

127 *See WorldCom/MCI* Order, 13 FCC Rcd at 18030-31, para. 9. See *also, e.g.*, 47 U.S.C. §§ 254, 259, 332(c)(7), 706; Preamble to Pub. L. No. 104-104, 110 Stat. 56 (1996).

128 *See, e.g., WorldCom/MCI Order,* 13 FCC Rcd at 18030-31, para. 9*; Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, CC Docket No. 98-24, Memorandum Opinion and Order, 13 FCC Rcd 15236, 15242-43, para. 11 (1998) (*AT&T/Teleport Order*); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 158.

129 *See, e.g., WorldCom/MCI Order*, 13 FCC Rcd at 18030-31, para. 9; *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20003, para. 32 ("the Commission examines whether a proposed license transfer is consistent with the policies of the Communications Act, including, among other things, the transfer's effect on Commission policies encouraging competition and the benefits that would flow from the transfer.").

130 *See, e.g., FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981); *Cellnet Communications, Inc. v. FCC*, No. 96-4022, 1998 WL 372319, at **10-12 (6th Cir. July 7, 1998). *See also WorldCom/MCI Order*, 13 FCC Rcd at 18033-34, 18038, paras. 13, 21; *AT&T/Teleport Order*, 13 FCC Rcd at 15246, para. 19, n.65; *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685, 8718-19, para. 57 (1997) (acknowledging that the Commission's use of its predictive judgment "is required by the terms of section 271 and consistent with the

52. Where necessary, the Commission can attach conditions to a transfer of lines and licenses in order to ensure that the public interest is served by the transaction.[131] Section 214(c) of the Communications Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[132] Similarly, section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.[133] Indeed, unlike the role of antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon its extensive telecommunications regulatory and enforcement experience to impose and enforce certain types of conditions that tip the balance and result in a merger yielding overall positive public interest benefits.[134]

53. In addition to its public interest authority under the Communications Act, the Commission shares concurrent antitrust jurisdiction with DOJ under the Clayton Act to review mergers between common carriers.[135] In this case, because our public interest authority under the Communications Act is sufficient to address both the competitive issues raised by the proposed merger and its likely effect on the public interest, we decline to exercise our Clayton Act authority for the proposed transaction.[136]

54. As noted in the *AT&T-TCI Order*, many transfer applications on their face show that the merger would yield affirmative public interest benefit and would not violate the

---

statutory scheme envisioned by Congress."), at 8719, para. 58 n.181 (collecting cases and noting the Supreme Court's recognition in various contexts that the Commission necessarily must make difficult predictive judgments in order to implement certain provisions of the Communications Act).

131 *See* 47 C.F.R. § 1.110. *See also WorldCom/MCI Order*, 13 FCC Rcd at 18031-32, para. 10; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20001-2, para. 30.

132 47 U.S.C. § 214(c). *See WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10 n.35 (*citing MCI Communications Corp*, File No. I-S-P-93-013, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3968, para. 39 (1994); *Sprint Corp.*, File No. I-S-P-95-002, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1867-72, paras. 100-33 (1996); *GTE Corp.*, File No. W-P-C-2486, Memorandum Opinion and Order, 72 FCC 2d 111, 135, para. 76 (1979)); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20002, para. 30 n.59 (*citing Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389-90 (D.C. Cir. 1995); *GTE Service Corp. v. FCC*, 782 F.2d 263, 268 (D.C. Cir. 1986); *Western Union Tel. Co. v. FCC*, 541 F.2d 346, 355 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977)).

133 47 U.S.C. § 303(r). *See, e.g., WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10 n.36 (*citing FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (*Nat'l Citizens)* (broadcast-newspaper cross-ownership rules properly adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) powers)).

134 *See WorldCom/MCI Order*, 13 FCC Rcd at 18034-35, para. 14.

135 *See* 15 U.S.C. §§ 18, 21(a) (granting the Commission jurisdiction under sections 7 and 11 of the Clayton Act to disapprove acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy" where "in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."). Both SBC and Ameritech are common carriers.

136 *See WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 12; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20005, para. 33. *See also United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc).

Communications Act or Commission rules, nor frustrate or undermine policies and enforcement of the Communications Act.[137] Such cases do not require extensive review and expenditure of considerable resources by the Commission and interested parties. This is not the case with respect to this proposed transaction. We analyze the potential public interest harms and benefits of this proposed merger, absent conditions, in the next sections.

## V. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

### A. Overview

55. We conclude that the proposed merger, considered without supplemental conditions, threatens our ability to fulfill our statutory mandate in the following three ways.

56. First, the proposed merger between SBC and Ameritech significantly decreases the potential for competition in local telecommunications markets by large incumbent LECs. The merger eliminates SBC and Ameritech as significant potential participants in the mass market for local exchange and exchange access services in the other's regions. Both firms have the capabilities and incentives to be considered most significant market participants in geographic areas adjacent to their own regions, and in out-of-region markets in which they have a cellular presence. This finding is based partly on our analysis of the plans of Ameritech to expand into St. Louis (in SBC's territory) which would have occurred but for the merger, and SBC's plans to expand into Chicago (in Ameritech's territory). As incumbent LECs, each firm is one of only a few potential entrants with the necessary systems, such as billing and operations support, required to provide local exchange services to residential and small business customers on a large scale. They also bring particular expertise to the process of negotiating and arbitrating interconnection agreements between incumbent and competitive LECs. In adjacent markets, each Applicant has an array of nearby switches that can be used to provide local exchange services in the other's traditional operating territories. Moreover, in out-of-region markets in which either Applicant has a cellular affiliate, it also has a base of customers to whom it can offer wireline local exchange services, potentially bundled with cellular and other offerings. Finally, in both adjacent and cellular out-of-region markets, SBC and Ameritech have brand recognition with mass market customers that would provide a strong and often unique advantage in providing competitive wireline services.

57. Second, the proposed merger frustrates the ability of the Commission (and state regulators) to implement the local market-opening provisions of the 1996 Act. The merger of SBC and Ameritech – two of the six remaining major incumbent LECs (the RBOCs and GTE) – would have an adverse impact on the ability of regulators and competitors to implement the competitive goals of the 1996 Act by deregulatory means. Comparing the practices of independent firms can assist federal and state regulators in defining incumbent LEC obligations and in discovering new approaches and solutions to open markets to competition under sections 251 and

[137] *See AT&T/TCI Order*, 14 FCC Rcd at 3170, para. 16.

271 and state law. Such comparative practice analyses (or "benchmarking") depend upon having a sufficient number of independent sources of observation available for comparison. Indeed, the development of the local competition that exists today can be attributed largely to comparative practice analyses of experiments and developments in various states and among various incumbent LECs, as indicated by examples in the Comparative Practices Analysis section of this Order (*see infra* Section V.C.).

58. Significant differences between the major incumbent LECs and other carriers preclude the use of other carriers as alternative benchmarks. Large incumbent LECs differ greatly from smaller incumbent LECs, competitive LECs and foreign LECs in regulatory treatment, structure and operation. Furthermore, statistical parity comparisons cannot be used as a substitute for all forms of incumbent LEC benchmarking. The decreased ability to employ comparative practice analysis that would result from the proposed merger ultimately would force regulators and competitors to replace benchmarking with more intrusive and costly methods of regulation, frustrating the goals of the 1996 Act and this Commission of opening markets and easing regulation, to the detriment of the public interest. We and our state colleagues would be forced to adopt more regulations of greater complexity, while competitors would be prevented from gaining valuable information that could help them succeed in breaking down entry barriers.

59. Moreover, the merger's elimination of Ameritech as an independently-owned RBOC is likely to reduce significantly the amount of innovation that regulators and competitors could observe and analyze. Ameritech frequently has taken an approach at the holding-company level that is different from the other RBOCs, examples of which are detailed in the Comparative Practices Analysis section (*see infra* Section V.C.). These differences by Ameritech in one state have allowed regulators and competitors to induce market-opening behavior from other incumbent LECs in other states. Another harm of the merger is that the larger combined entity will have a greater incentive to unify the practices of its separate operating companies to affect the outcome of both best practices and average practices benchmarking by regulators and competitors, resulting in an overall loss of diversity at the operating-company level. The proposed merger of SBC and Ameritech would also directly increase the incentive and ability of remaining incumbent LECs to coordinate their behavior to resist market-opening measures. As the number of relevant independently-owned incumbent LECs shrinks to a small few, the probability of coordination significantly increases.

60. Third, while it would diminish regulatory efficacy, the proposed merger also would increase the incentives and ability of the larger merged entity to discriminate against rivals in retail markets where the new SBC will be the dominant incumbent LEC. The merger will lead the merged entity to raise entry barriers that will adversely affect the ability of rivals to compete in the provision of retail advanced services, interexchange services, local exchange and exchange access services, thereby reducing competition and increasing prices for consumers of those services. The increase in the number of local areas controlled by SBC as a result of the merger will increase its incentive and ability to discriminate against carriers competing in retail markets that depend on access to SBC's inputs in order to provide services. For example, if SBC discriminates against a

competitive LEC attempting to enter Houston, it will raise this rival's costs. This competitive LEC will have less capital to spend on common research, product development, and marketing costs, making the competitive LEC a less effective competitor in other areas such as Chicago because of its overall higher costs. Prior to the merger, SBC would not realize the benefits in Chicago from such conduct. After merging with Ameritech, which is the incumbent LEC in Chicago, SBC would realize such benefits. Because SBC after the merger would realize more of the gains from what are presently "external" effects, it would have a greater incentive to engage in discrimination than the combined incentives that the two individual companies would have had in their smaller regions.

61. Any likelihood of increased discrimination and heightened entry barriers causes particular concern in the retail market for advanced services, given the Commission's ongoing efforts to encourage innovation and investment in these emerging markets. Competitors' requests for the type of interconnection and access arrangements necessary to provide new types of advanced services are continually evolving and provide ample scope for incumbents to discriminate in satisfying these requests. The combined entity has an increased incentive to discriminate against a competitor such as Sprint ION that is seeking to enter markets on a national basis, because the merged firm will realize the benefits over the larger combined area in its control. Likewise, once an incumbent LEC has authority to provide interLATA services within its region, it has an incentive to discriminate against the termination of its competitors' calls that originate in that region in order to induce callers at the originating end to choose the incumbent LEC as their interexchange service provider. SBC after the proposed merger will have a much larger "in-region" area, and thus will terminate a greater number of calls from in-region customers. The larger merged firm would therefore have a greater incentive to engage in discrimination, which is likely to be particularly acute with respect to advanced or customized access services where such discrimination would be most difficult to detect.

62. In short, absent stringent conditions, we would be forced to conclude that this merger does not serve the public interest, convenience or necessity because it would inevitably retard progress in opening local telecommunications markets, thereby requiring us to engage in more regulation. Standing alone, without conditions, the initial application proposed a license transfer that would have been inconsistent with the approach to telecommunications regulation and telecommunications markets that the Congress established in the 1996 Act, ratifying the fundamental approaches enshrined in the MFJ. For that reason, we conclude that it would be inconsistent with the public interest, convenience and necessity to permit this license transfer in the absence of significant and enforceable conditions. The remainder of Part IV explains these conclusions in detail.

### B. Analysis of Competitive Effects

#### 1. Competition Between SBC and Ameritech

63. We begin our review of the proposed merger of SBC and Ameritech by examining the merger's likely effects on interactions between the merging firms, which

represents one prong of our analysis of potential public interest harms. Until recently, carriers seeking to compete with incumbent LECs in local exchange and exchange access services markets had been prevented or deterred from entering due to legal, regulatory, economic and operational barriers. As such, these markets are currently undergoing a transition to competitive market conditions, as envisioned by the 1996 Act. Accordingly, as the 1996 Act is being implemented and local markets are opening to competition, it is necessary to use an analysis of competitive effects that accounts for the transitional nature of these local markets.[138] This "transitional market" analysis is relevant to the examination of a merger under the Communications Act because the Act requires this Commission actively to promote the development of competition in telecommunications markets, not merely to prevent the lessening of competition, which is the policy objective of antitrust laws.

64. As explained in the *WorldCom/MCI Order*, our framework for analyzing these transitional markets reflects the values of, and builds upon, but does not attempt to copy, the "actual potential competition" doctrine established in antitrust case law.[139] Under the actual potential competition doctrine, a merger between an existing market participant and a firm that is not currently a market participant, but that would have entered the market but for the merger, violates antitrust laws if the market is concentrated and entry by the nonparticipant would have resulted in deconcentration of the market or other pro-competitive effects.[140] As the case law indicates, one obstacle facing parties bringing an actual potential competition case is to demonstrate that the acquired firm would have entered the relevant market absent the merger. The transitional markets framework set forth in the *Bell Atlantic/NYNEX Order*, which is well-tailored to the Commission's unique role as an expert agency and its statutory obligation to promote competition and to open local markets, identifies as "most significant market participants" not only firms that already dominate transitional markets, but also those that are most likely to enter soon, effectively, and on a large scale once a more competitive environment is established. The Commission seeks to determine whether either or both of the merging parties are among a small number of these most significant market participants,[141] in

---

138 *See WorldCom/MCI Order*, 13 FCC Rcd at 18036-37, para. 18 ("[T]he analytical framework set forth in the *Bell Atlantic/NYNEX Order* is a natural extension of the principles, contained in the merger guidelines and existing antitrust case law, to transitional markets.").

139 *See WorldCom/MCI Order*, 13 FCC Rcd at 18038, para. 20.

140 *See id.* (*citing United States v. Marine Bancorporation*, 418 U.S. 602 (1974); ABA Section of Antitrust Law, Antitrust Law Developments (4th ed. 1997) at 346-50 (Antitrust Law Developments)).

141 As we stated in the *AT&T/TCG Order,* when analyzing a merger in a market that is rapidly changing, the best way to assess the likely effect of the merger is to isolate the effect of the merger from all other factors affecting the development of the relevant market over time. This is achieved by framing the analysis in a way that holds constant the effects of all changes in the market conditions other than those directly caused by the merger. To do this, we also identify as market participants those firms that have been effectively precluded from the market -- that is, those firms that are most likely to enter (or are just beginning to enter) the market but have until recently been prevented or deterred from participating in the market by the barriers that the 1996 Act seeks to eradicate. We then identify the most significant participants based on an assessment of capabilities and incentives to compete effectively in the relevant market. *AT&T/TCG Order*, 13 FCC Rcd at 15245-46, para. 17.

which case its absorption by the merger will, in most cases, if not offset by countervailing positive effects, harm the public interest in violation of the Communications Act.[142]

65. In this portion of the Order, we focus on the probable effects of SBC's acquisition of Ameritech on the provision of local exchange and exchange access services.[143] In analyzing the competitive effects of the instant merger, we take into account that SBC and Ameritech, until recently, have been effectively precluded from competing in each other's local markets. We therefore examine the ability and incentive of both SBC and Ameritech to enter each other's previously closed market. We conclude therefore that it is appropriate to utilize the "transitional markets" analytical framework of the *Bell Atlantic/NYNEX Order* to determine whether this merger would result in a potential harm to the public interest in the provision of local exchange and exchange access services in SBC's or Ameritech's regions.

### 2. Local Exchange and Exchange Access Services

#### a) Summary

66. We conclude that the merger causes a public interest harm by eliminating SBC and Ameritech as among the most significant potential participants in the mass market for local exchange and exchange access services in each other's regions. In the mass market for local exchange services, we conclude that both firms are most significant market participants in geographic areas adjacent to their own regions, and in out-of-region markets in which they have a cellular presence. We base this finding partly on our analysis of the plans of Ameritech to expand into St. Louis, and SBC's plans to expand into Chicago. In the larger business market for local exchange and exchange access services, SBC and Ameritech are only two of a larger number of actual and potential competitors in each other's regions. The merger would thus be less likely to have competitive effects leading to public interest harms in these markets. The exposition of our analysis of these competitive effects issues is necessarily truncated. Because much of the information concerning the parties' business plans has been submitted under a blanket of confidentiality, accordingly, a good deal of the information on which we rely here is explained only in Appendix B, to which access must be restricted.

---

[142] Of course, a simple antitrust analysis of mergers could generally be characterized as attempting to identify the most significant participants in a market and to determine if the acquired firm is among them. The important distinction in transitional markets is that firms that have been precluded from entering the market may potentially be considered significant participants. Furthermore, based on an analysis of their abilities and incentives to expand out of region, firms may be included as significant competitors even though they may have yet to manifest a firm intention to enter or to invest substantially in preparation for entry. Of course, the case for including a firm as a significant potential competitor will generally be somewhat stronger to the extent that it can be established that the firm has made plans to enter or has already made investments in preparation for entry.

[143] *See WorldCom/MCI Order*, 13 FCC Rcd at 18036-37, para. 18; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20008-10, paras. 37-38.

### b) Relevant Markets

67. As the Commission explained in the *BELL ATLANTIC-NYNEX Order*, we begin our analysis of the proposed merger by defining the relevant product and geographic markets.[144] We then consider whether the merger frustrates the Communications Act's goal of encouraging greater competition in relevant local markets.

68. *Product Markets.* We analyze the competitive effects of this merger on the provision of local exchange and exchange access services.[145] As we explained in the *WorldCom/MCI Order*, to define relevant product markets we can identify and aggregate consumers with similar demand patterns. For purposes of analyzing the competitive effects of this merger on these services we identify two distinct relevant product markets: (1) residential consumers and small business (mass market); and (2) medium-sized and large business customers (larger business market). We distinguish mass market consumers from larger business customers because the services offered to one group may not be adequate or feasible substitutes for services offered to the other group, and because firms need different assets and capabilities to target these two markets successfully.[146]

69. *Geographic Markets.* As we explained in the *WorldCom/MCI Order,* we aggregate into a relevant geographic market those customers facing similar choices regarding a particular relevant product or service in the same geographic area.[147] In the instant merger proceeding, we focus on competition within metropolitan areas because all out-of-region expansion plans contemplated or undertaken by either Applicant targeted customers in metropolitan areas, as discussed in Appendix B. Indeed, at present and for the next few years, any local exchange and exchange access competition in both relevant product markets is likely to be confined to metropolitan areas. Any loss of potential competition by merger is therefore likely to affect primarily specific metropolitan areas. We focus on individual metropolitan areas because each may attract different levels of competition, and certain competitors, including the

---

144 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53; *see also WorldCom/MCI Order*, 13 FCC Rcd at 18119, para. 164.

145 In Sections VIII.A and VIII.B we address the proposed merger's impact on the wireless, international markets.

146 *See generally WorldCom/MCI,* 13 FCC Rcd at 18119, para. 164; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53. As recognized in these merger orders, mass market customers have a different decision-making process than do larger business customers. For example, residential and small businesses are served primarily through mass marketing techniques including regional advertising and telemarketing, while larger businesses tend to be served under individual contracts and marketed through direct sales contacts. *See also* Application, Description of Transaction at 64. Applicants' product market description also agrees with our established analysis.

147 *See WorldCom/MCI Order,* 13 FCC Rcd at 18119-20, para. 166; *See also Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20017, para. 54. The geographic market is more accurately defined as a series of point-to-point markets. We can consider, as a whole, groups of point-to-point markets where customers face the same competitive conditions. We therefore treat as a geographic market an area in which all customers in that area will likely face the same competitive alternatives for a product. *WorldCom/MCI Order*, 13 FCC Rcd at 18040, para. 25. As we noted in the *AT&T/TCG Order*, discrete local areas may constitute separate relevant markets, since customers may face different competitive alternatives in these markets. *See AT&T/TCG Order,* 13 FCC Rcd at 15248, para. 21.

Applicants, may have particular strengths or unique assets in one metropolitan area compared with another. For instance, in St. Louis, Ameritech has advantages as a competitive LEC based on its cellular presence and as an incumbent LEC in an adjacent area. These considerations are relevant as we analyze the potential public interest harms below.

70. We reject arguments that we should modify or limit our geographic market definition. For example, the Applicants assert St. Louis and Chicago are the only geographic areas where they arguably would compete against each other.[148] Although we agree with Applicants that the geographic areas of St. Louis and Chicago raise competitive concerns for local exchange and exchange access services, as discussed below, other metropolitan areas warrant examination. Some commenters contend that the relevant geographic market is everywhere SBC and Ameritech could have competed had they pursued their competitive LEC business independently of each other.[149] Similarly, the Texas Office of Public Utility Counsel maintains the relevant market is the combined serving areas of SBC and Ameritech, rather than St. Louis and Chicago.[150] The Texas Office of Public Utility Counsel further argues that, if telecommunications customers have locations nationwide, marketing managers will eventually consider the relevant market as a national market.[151] We find that using our above stated approach, our analysis will include, but not be limited to, examination of these areas. We, therefore, find there is no need to modify our market definition, as the results of our analysis would be identical using any of these geographic market definitions.[152]

### c) Market Participants

71. To analyze the probable effects of this merger on the relevant product and geographic markets, we first identify significant market participants. We note that incumbent LECs are still dominant within their regions, and therefore are included in the list of most significant market participants within their respective in-region markets. Next we consider, among other things, whether, but for the merger, either of the merging parties would be a significant potential competing provider of local exchange and exchange access services in the other's markets. We examine each of the merging firm's capabilities and incentives to provide local exchange and exchange access services outside the region in which it is an incumbent LEC, with particular emphasis on analyzing existing plans and any past attempts to do so. We then turn to an analysis of other firms that may be considered most significant market participants in the relevant markets to determine the competitive impact of the loss by merger of one of the Applicants as an independent entity.

---

148 *See* SBC/Ameritech July 24 Application, Description of the Transaction at 64-65.

149 *See* e.spire Oct. 15 Comments at 8; *See also* South Austin Community Coalition Council Oct. 15 Comments at 2.

150 Texas Office of Public Utility Counsel Oct. 15 Comments at 6.

151 *Id.* at 6-7. We note that market definition is based on economic principles, as embodied in the 1992 Horizontal Merger Guidelines, and not popular conceptions or marketing strategies.

152 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-17, para. 54; *WorldCom/MCI Order*, 13 FCC Rcd at 18042, para. 30.

72. As described in the *Bell Atlantic/NYNEX Order*, we identify the most significant market participants from the universe of actual and precluded competitors based on an analysis of the firms' capabilities and incentives to compete effectively in the relevant market. Of particular interest are those market participants that are likely to be at least as significant a competitive force as either of the merging parties.[153] In determining the most significant market participants from the universe of actual and precluded competitors, we identify the market participants that have, or are most likely to gain speedily, the greatest capabilities and incentives to compete most effectively and quickly in the relevant market.

73. In prior merger orders, the Commission set out the various capabilities it considers in identifying the most significant potential competitors in local exchange and exchange access markets.[154] Those capabilities include whether the firm: (1) has the operational ability to provide local telephone service (*i.e.*, know how, and operational infrastructure, including sales, marketing, customer service, billing and network management); (2) could quickly acquire a critical mass of customers; (3) has brand name recognition, a reputation for providing high quality and reliable service, an existing customer base, or the financial resources to get these assets; and (4) possesses some significant unique advantages, such as a cellular presence in the relevant market.[155]

74. In order to determine the likelihood that a firm that is not currently serving a relevant market nevertheless will enter this market in the future, we consider industry trends that may lead a firm currently serving one product, customer, or geographic segment to expand to other relevant markets. For instance, in a number of recent merger applications before the Commission, prior applicants have pointed to consumers' demand for "one-stop-shopping," and/or end-to-end-service that is in part justifying these Applicants' merger plans.[156] In order to meet these demands, firms providing one service may choose to expand their offering to provide a whole range of products or expand to other geographic regions.

---

153 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20019, para. 58. Actual participants are those firms currently offering the relevant products in the relevant geographic markets. Precluded competitors, as discussed above, are those firms most likely to have entered the market but for the barriers to entry the 1996 Act sought to lower. *Id.* at paras. 59-60. As the Commission recognized in the *Bell Atlantic/NYNEX Order*, in determining the most significant market participants from the universe of actual and precluded competitors, we identify the market participants that have, or are most likely to gain speedily, the greatest capabilities and incentives to compete most effectively and quickly in the relevant market. *Id.* at para. 62.

154 *Id.* at paras. 58-64; *WorldCom/MCI Order*, 13 FCC Rcd at 18047-48, 18051-56, 18122, paras. 36, 42-51, 171.

155 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20020-21, para. 62.

156 *See WorldCom/MCI Order* 13 FCC Rcd at 18134-36, para. 194; *AT&T/TCI Order*, 14 FCC Rcd at 3228-29, para. 145. *See also AT&T/TCG Order*, 13 FCC Rcd at 15261, para. 47 n.148. In the *WorldCom/MCI Order*, Applicants argued that the merged company would be better able to provide bundled services and innovative product combinations to consumers, and would also be able to offer multi-location customers door-to-door or end-to-end connectivity over their own fiber transport and intelligent network facilities. Similarly, in the *AT&T/TCI Order*, Applicants contended that the merger would increase the availability to consumers of a wide array of packaged services including local, long distance, wireless and high-speed Internet services. *See also* SBC/Ameritech July 24 Application, Description of Transaction, Kahan Aff. at 10,12.

75. We consider all available evidence demonstrating that precluded competitors would likely have entered relevant markets.[157] For instance, Applicants' plans or attempts to enter the relevant markets represent probative evidence of each Applicant's own perception that it possesses the capabilities and incentives necessary to be a significant participant in the market. We likewise look at unsuccessful plans to enter a relevant market in the past. Although a "failed" attempt might suggest that a firm is not a significant market participant, we would consider all relevant circumstances, including changes in market conditions that might facilitate successful subsequent entry and the strategic business consequences to a firm of failing to enter into a relevant market.[158] Finally, the lack of entry plans does not eliminate a firm from being considered a significant market participant; rather, we consider whether the firm has the capabilities, and is likely to have the incentive, to become a significant market participant soon.

76. Applying this analysis to the instant merger, we find that eliminating Ameritech and SBC as actual or potential participants in the mass market for local exchange and exchange access services in each other's regions results in a substantial public interest harm by frustrating the achievement of the Communications Act's objective of fostering greater competition in these markets. This harm must be outweighed by compensating benefits if the license transfer is to be approved.

### (1) Mass Market

77. We find that, with respect to the mass market for local exchange and exchange access services, SBC and Ameritech have the capabilities and incentives to make each firm a most significant market participant in particular markets in each other's regions. First, as described in Appendix B, prior to the announcement of the proposed merger, SBC and Ameritech had plans to enter other incumbent LECs' regions, including each other's. Second, as incumbent LECs, SBC and Ameritech have certain advantages when expanding out-of-region that other potential local service market entrants lack.

78. *Ameritech's Out-of-Region Plans.* We find that Ameritech is not only a most significant market participant in SBC's territory but also, as described in Appendix B, had both the incentives and capabilities to become a significant market participant in the St. Louis mass

---

[157] *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20021-22, para. 64. We also noted in *Bell Atlantic/NYNEX*, that if a firm's internal documents demonstrate serious consideration of entry, they may create an inference of a capability to effect the market without a detailed examination of the competitor's capabilities and incentives.

[158] Firms providing one service may choose to expand their offering to provide a whole range of products or expand to other geographic regions. For instance, as noted in Section V.B.2.c) (Market Participants), in a number of recent merger applications before the Commission, the merging parties have asserted that consumers are expressing demand for "one-stop shopping." *See WorldCom/MCI Order,* 13 FCC Rcd at 18037, para. 19; *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20015, para. 52. According to the Applicants, this demand stimulated in part their merger plans. We also examine the activities of competitors providing similar services; if a competitor branches into new relevant markets, we may determine that a firm could or would respond to such a competitive challenge by serving these other relevant markets as well.

market for local exchange and exchange access service. The fact that Ameritech, prior to merger negotiations, had not begun offering commercial local wireline services out-of-region to the general public does not establish that Ameritech lacked the capabilities and incentives to expand. As described in greater detail in Appendix B, we find that, but for the merger, Ameritech would have implemented Project Gateway and entered the St. Louis residential market. In project Gateway, Ameritech's cellular company in St. Louis planned to offer local service as part of a bundle first to residential, and then to small business customers.[159] Applicants concede that uncertainties created by the planned merger were among the reasons for placing Project Gateway on hold.[160] In addition, in testimony before the Illinois Commerce Commission, Ameritech admitted that it would have proceeded with the launch of Project Gateway had it not been for the merger.[161] Specifically, Ameritech's internal documents show that the firm had already announced its intention to enter SBC's St. Louis market, and was actively implementing those entry plans at the time the merger was announced.[162] Once the proposed merger was announced, Ameritech suddenly abandoned these plans.[163]

79. Ameritech offers conceivable reasons for canceling Project Gateway besides the merger, but many or all of them had existed for a long time without causing it to be cancelled.[164] Also, whatever the merits of these reasons, none of them is described in contemporaneous documents as *the* reason, or even *a* reason, for the cancellation. Indeed, there is no stated reason for the cancellation and no statement of a simultaneous event provoking cancellation in the documents Ameritech has provided to us. What did, in fact, occur simultaneously with the cancellation of Project Gateway was the agreement of Ameritech and SBC to merge. We conclude that Project Gateway was cancelled because SBC and Ameritech preferred to merge rather than compete in the mass market for local exchange and exchange access services in St. Louis and perhaps elsewhere.[165]

80. Although Ameritech minimizes the competitive significance of its own independent entry absent the merger, the preponderance of the evidence demonstrates that

---

159 *See* Appendix B (Summary of Confidential Information and Conclusions).

160 *See* SBC/Ameritech July 24 Application, Description of the Transaction at 71-72.

161 *See* Appendix B (Summary of Confidential Information and Conclusions).

162 *See id.*

163 *See* SBC/Ameritech July 24 Application, Description of the Transaction.

164 Among other reasons for canceling Project Gateway, Ameritech argues that projections indicated financial losses due in part to the increased competition in the St. Louis market for mobile services. This justification nevertheless is tied to the merger, as Ameritech states that the significance of these financial losses was to diminish the attractiveness of its cellular assets in St. Louis to potential buyers of those assets given the "substantial probability" that the assets would need to be divested to satisfy antitrust and regulatory authorities. Ameritech also points to implementation problems (billing, pricing, and order processing) and notes that fixing them would have taken significant resources. Finally, Ameritech notes that, contrary to predictions, its new mobile competitors did not enter with a bundled service offering. Ameritech argues that this removed the need for a defensive offering such as Project Gateway. *See* Appendix B (Summary of Confidential Information and Conclusions), *See also* SBC/Ameritech July 24 Application, Description of Transaction at 71-72.

165 *See* Appendix B (Summary of Confidential Information and Conclusions).

Ameritech's portrayal is self-serving.[166] Ameritech argues Project Gateway was resale-based, producing less competition than facilities-based entry. Next, Ameritech claims it lacked strong brand name recognition in St. Louis. Ameritech also argues it had problems implementing and launching the service in St. Louis because of difficulties interfacing with SBC's operations support systems (OSS). Lastly, Ameritech states it had difficulty pricing a bundle of services that would attract customers in St. Louis.[167]

81. We disagree with Ameritech that its entry into St. Louis would have had a limited impact on that market. We find that absent the merger, it is highly likely that Ameritech ultimately would have made Project Gateway facilities-based.[168] Although Ameritech initially relied on resale, this is typical of initial entry moves by competitive LECs. A competitive LEC's entry by resale may be a necessary first step to facilities-based competition. It is not *per se* a disavowal of it. In fact, Ameritech's documents indicate that it was considering facilities-based competition when it achieved sufficient scale to justify the related expenditure in capital,[169] and that it began several steps that, if completed, would have made it a facilities-based competitor in St. Louis.[170] Furthermore, we find that Ameritech's assertion that it lacks brand name recognition in St. Louis has no credibility. Ameritech had been aggressively promoting and providing its cellular service in St. Louis, under the Ameritech brand name, for many years. Ameritech's own documents show that it believed it had a strong brand name in St. Louis and that its brand name would enable it to compete effectively in the local service market there.[171] Finally, it is significant to our analysis that SBC considered Ameritech to be a potential facilities-based provider of local service to the Missouri consumer market[172] with strong brand name recognition.[173] Therefore, we conclude that Ameritech is a significant market participant in the mass market for local exchange and exchange access services in St. Louis.[174]

82. *SBC's Out-of-Region Plans.* The evidence indicates that SBC is a potential entrant for mass market local exchange and exchange access service in Ameritech's region.[175] The evidence in the record indicates that SBC had plans to enter the mass market in Chicago, building off its cellular base in that city, and could thus be viewed as a potential entrant into this

---

166 *See id.*

167 *See id.*

168 *See id.*

169 *See id.* Ameritech documents indicate that it considered facilities-based entry for several out-of-region endeavors.

170 *See* Appendix B (Summary of Confidential Information and Conclusions).

171 *See id. See also* Sprint Oct. 15 Petition at 16-17.

172 *See* Appendix B (Summary of Confidential Information and Conclusions).

173 *See id.*

174 *See id. See also* Sprint Oct. 15 Petition, Decl. of John B. Hayes at 28-31; Focal Oct. 15 Comments at 14; CPI Nov. 16 Reply Comment at 7; Consumer Federation of America/Consumers Union (CU/CFA) Nov. 16 Reply Comments at 3; Report of Gregory L. Rosston & Matthew G. Mercurio, An Economic Analysis of the SBC-Ameritech Merger at 15 (April 26, 1999), attach. to Attorneys General of Indiana, Michigan, Missouri, and Wisconsin *Ex Parte* (filed April 27, 1999)(State Attorneys General Apr. 27 *Ex Parte,* Rosston & Mercurio Report)

175 *See* Appendix B (Summary of Confidential Information and Conclusions).

market.[176] Support for this argument comes from SBC's own statements. For instance, in October 1996, SBC's James S. Kahan testified in the California SBC/PacTel merger proceeding that SBC had certain entry advantages in the Chicago market and therefore it "would make sense to enter the local exchange market in Chicago but not in Los Angeles." Kahan stated:

> In Chicago, we have an extensive wireless network consisting of 10 switches and over 600 cell sites. That network also includes extensive backbone network of microwave, leased facilities, and connections to a SONET ring. This network is supported by a sophisticated billing system, a responsive care unit, as well as sales and distribution marketing, accounting, finance, installation and maintenance and other personnel who reside in and understand the Chicago market. In addition, we have a well recognized brand name since we operate under the Cellular One name in Chicago. We also have a large existing customer base to which we send bills every month and to whom we could market services.[177]

83. We conclude that SBC was a significant potential entrant into Ameritech's region; SBC disagrees. SBC argues that Rochester, New York, was a first experiment in out-of-region competition in local services, and that the experiment failed, ending out-of-region planning. Nevertheless, we base our conclusion in part on our analysis of the ability of SBC to pursue out-of-region opportunities using, in this instance, its out-of-region cellular assets. In addition, although it had no existing plans to enter out-of-region territories at the time of the merger, SBC's internal documents indicate the company contemplated such entry when the competitive landscape became clear, as discussed in Appendix B.[178] Therefore, we conclude that SBC had the incentives to make it a significant potential market participant in the mass market for local services in out-of-region markets such as Chicago. Significantly, Ameritech also perceived SBC's potential entry into Chicago as a competitive threat to Ameritech.[179]

84. *Capabilities and Incentives.* The Applicants' own plans, as well as the Commission's independent analysis, indicate that SBC and Ameritech each have the operational

---

[176] Baldwin and Golding argue SBC's Rochester experience (discussed in para. 78, *infra*) is not a good predictor of success in Chicago. The Consumer Coalition Oct 15 Comments, Aff. of Susan M. Baldwin and Helen E. Golding at 38. Chicago, unlike Rochester, has many corporate headquarters whose telecommunications managers are familiar with SBC. Rosston & Mercurio argue that SBC is a potential entrant into Chicago since it has unique expertise, experience, operating systems, unique value, adjacency, brand name and facilities. *See* State Attorneys General Apr. 27 *Ex Parte,* Rosston & Mercurio Report at 19-20. *See also* CU/CFA Nov 16 Reply Comments.

[177] Rebuttal Testimony of James S. Kahan (SBC), In the Matter of the Joint Application of Pacific Telesis Group and SBC Communications for SBC to Control Pacific Bell, Cal PUC Docket No. 96-05-038 (Cal. PUC Oct. 15 1996).

[178] *See* Appendix B (Summary of Confidential Information and Conclusions).

[179] *See* Appendix B (Summary of Confidential Information and Conclusions) citing State Attorney's General Apr. 27 *Ex Parte,* Rosston & Mercurio Report at 19.

capabilities necessary to enter out-of-region markets. In general, each has the requisite access to the necessary facilities, "know how," and operational infrastructure such as customer care, billing, and related systems that are essential to the provision of local exchange services to a broad base of residential and business customers.[180] These systems are required whether entry occurs through resale, use of UNEs, or some other form of facilities-based entry. SBC and Ameritech also possess special expertise as incumbent LECs that each could bring to the interconnection negotiation and arbitration process when entering out-of-region markets because of their intimate knowledge of local telephone operations and experience negotiating interconnection agreements with new entrants.[181]

85. Moreover, in a number of areas, Ameritech and SBC have the additional advantage of adjacency, or a cellular presence, or both.[182] Each company has an array of switches and switching locations that have capacity (or can be readily upgraded) to provide switching to contiguous territories. Thus, where they are contiguous, SBC or Ameritech can lease or build transport from their existing switches to a newly entered market more readily than other potential local service providers because of proximity to the newly entered market and their understanding of the requirements for local exchange services.[183] Finally, both Ameritech and SBC have brand recognition in contiguous regions because of extensive advertising in media markets that cross these regions.[184] Ameritech's research, for example, shows its brand recognition in St. Louis is so high that it essentially proves Ameritech is one of the "top two"

---

[180] *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd 20020, 20040-41, paras. 62, 106-108; *see also* AT&T Oct. 15 Petition at 22; Focal Oct. 15 Comments at 15; Hyperion Oct. 15 Comments at 27; Level 3 Oct. 15 Comments at 8-10; Sprint Oct. 15 Petition at 8; Telecom Resellers Assn. Oct. 15 Comments at 8; State Attorney's General Apr. 27 *Ex Parte,* Rosston & Mercurio Report at 11-12; *see generally* CU/CFA Oct. 15 Comments at 3-7; Texas Public Utility Counsel Oct. 15 Comment at 6, *citing* Shepard Aff. at 25-48.

[181] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd 20040, para. 107; *see also* AT&T Oct. 15 Petition at 23; Sprint Oct. 15 Petition at 9; MCI WorldCom Oct. 15 Comments at 31.

[182] *See* AT&T Oct. 15 Petition at 23; Sprint Oct. 15 Petition at 9. In the *Bell Atlantic/NYNEX Order* we concluded that Bell Atlantic was a most significant market participant in the adjacent LATA 132. This conclusion was based on the record which demonstrated Bell Atlantic had plans to enter the mass market for local exchange and exchange access service in the New York metropolitan area and had the capabilities necessary to do so. *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20025, para. 73.

[183] As contiguous incumbent LECs, Ameritech and SBC also have the ability to use remote digital loop carriers to serve out-of-region end users. AT&T states such technology has a range of about 125 miles, which would permit it to be used in conjunction with the contiguous provider's switch in its nearby in-region territory. *See* AT&T Oct. 15 Petition at 23; Sprint Oct. 15 Petition at 9. Ameritech argues elsewhere that this distance is actually much greater, noting that switch manufacturers have designed their equipment to serve large geographic areas; for instance, "Lucent's 5ESS switch permits a CLEC to locate a remote switching module ... up to 600 miles away from the host switch, allowing CLECs 'to expand networks and service offerings cost-effectively.'" Ameritech notes that AT&T is actually using switches to serve customers at up to 217 miles from the switch (a switch in Grand Rapids, MI is serving Perkins, MI). Ameritech Comments, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket Nos. 96-98, 95-185 (filed May 26, 1999) at 78-80 (Ameritech May 26 Comments).

[184] *See* AT&T Oct. 15 Petition at 23-24; Focal Oct. 15 Comments at 15; Hyperion Oct. 15 Comments at 27-28; Sprint Oct. 15 Petition at 9; Telecom Resellers Assn. Oct. 15 Comments at 8.

telecommunications brand names among consumers in the market.[185] The cellular assets that Ameritech and SBC possess in each other's regions also provide unique advantages for out-of-region entry. For instance, a cellular presence provides a ready customer base for expanding into wireline local telephony.

86. We therefore reject Applicants' claim that they should not be considered most significant market participants in out-of-region markets.[186] Given the depth and breadth of Ameritech's expansion plans, we find it likely that Ameritech would have expanded into other SBC markets, in addition to St. Louis, but for the merger. We find it significant that Ameritech viewed Project Gateway as a "testbed" in which it could learn about competing with incumbent LECs in local service and long distance service, customer demand for bundles, and how to implement local and other services in a new area.[187] Project Gateway, had it not been cancelled by Ameritech so that it could merge with SBC, would have given Ameritech insights and experience for later use about how best to enter additional out-of-region markets.[188] One potential means for entry for Ameritech was to build on its larger business expansion plans, as described below. We also find that SBC may have expanded into Ameritech markets, such as Chicago, using its cellular bases spread throughout Ameritech's region.[189]

87. As for other significant market participants, the dominance of each incumbent LEC in its own region makes it a most significant competitor in its own region. We also reaffirm our finding in prior decisions that the three largest interexchange carriers, AT&T, MCI (now MCI WorldCom), and Sprint are among the most significant participants in the mass market for local exchange and exchange access services.[190] We find that these firms each have the capabilities, incentives, and stated intentions to serve the mass market for local exchange services. All three firms already have a substantial base of residential customers of their long distance services and established brand names resulting from their marketing of these services. Thus, these firms are among the best positioned to provide local services to residential customers. Further, their stated intentions to begin serving the mass market for local services underscores their position as being among the most significant competitors.[191] Nevertheless, in

---

185 *See* AT&T Oct 15 Petition at 24, *citing* Wall St. J., at B4 (June 8, 1998) ("*Spirit of St. Louis Haunts SBC-Ameritech Merger*"). *See also infra* at para. 90.

186 *See* SBC/Ameritech Nov. 16 Reply Comments at 45-52, 67-72; *See also* Citizens for a Sound Economy Oct 15 Comments at 6-7.

187 *See* Appendix B (Summary of Confidential Information and Conclusions).

188 *See id.*

189 Besides Chicago, SBC has cellular properties in the following MSA's in Ameritech's region: Detroit-Ann Arbor (MI), Milwaukee (WI), Columbus (OH), Dayton (OH), Flint (MI), Madison (WI), Hamilton-Middletown (OH), Lima (OH), Racine (WI), and Springfield (OH), Decatur (IL), Sheboygan (WI), Kankakee (IL), Aurora-Elgin (IL) and Joliet (IL). *The Wireless Communications Industry*, 1998/1999 Winter Edition at 154. SBC also has PCS properties in Cleveland (OH) and Indianapolis (IN). *Id.* at 156.

190 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20029, para. 82.

191 In the AT&T/TCI merger proceeding, the Commission found that the merging parties provided evidence supporting their intention to combine TCI's cable assets with AT&T's experience and brand name to begin providing residential local exchange service. *See AT&T/TCI Order*, 14 FCC Rcd at 3230-31, para. 148. Similarly, MCI and WorldCom assured the Commission during the MCI WorldCom proceeding that they would "augment

certain regions, such as adjacent territories or cellular markets, where incumbent LECs have brand name and/or customer base advantages similar to those enjoyed by the interexchange carriers with their customers, incumbent LECs have the additional advantage of their experience in providing local services to mass market customers as incumbent LECs.[192]

88. Other firms, currently serving or planning to serve the mass market for local exchange and exchange access services out-of-region, are not yet included in the list of most significant market participants. Competitive LECs have begun serving residential markets but do not yet have the existing customer base and brand name that enable AT&T, MCI, and Sprint, as well as certain incumbent LECs, to become most significant competitors.

### (2) Larger Business Market

89. We find that the larger business local exchange market has a number of market participants with similar incentives and capabilities as an incumbent LEC expanding out-of-region. As the Commission found in earlier orders, incumbent LECs still dominate the market for local exchange and exchange access services sold to larger business customers in their regions and are therefore most significant market participants.[193] We recognize, as we observed in the *WorldCom/MCI Order*, that in contrast to the relative lack of competition incumbent LECs face in the market for local services sold to mass market customers, incumbent LECs face increasing competition from numerous new facilities-based carriers in serving the larger business market.[194] We note that this competition lessens the potential public interest benefits of SBC or Ameritech expanding out-of-region in the larger business market for local exchange and exchange access services.[195]

90. As with the mass market, incumbent LECs have significant capabilities and incentives to expand into the market for larger business customers out-of-region. Prior to the merger Ameritech was offering out-of-region services to its larger business customers, and had already entered several metropolitan areas in SBC's territory as part of its Managed Local

---

their efforts in the residential local market," notably with respect to providing service to residents of multiple dwelling units (MDUs). *See WorldCom/MCI Order*, 13 FCC Rcd at 18132-33, paras. 191-92. Finally, Sprint has represented in the instant merger proceeding its intention to begin serving local mass market customers in numerous local markets with its ION offering. Sprint Oct. 15 Petition, Brauer Decl. at 5.

[192] GTE, as an incumbent LEC, has similar capabilities for expansion as an RBOC. For example, GTE has adjacency to many large markets in RBOCs regions and cellular assets. However, GTE has expressed to the Commission difficulties in expanding out-of-region, even in adjacent territories or using its cellular bases. *See Application for Consent to transfer Control of Licenses and Section 214 Authorizations from GTE to Bell Atlantic,* CC Docket No.98-184 at 7 (filed Oct. 24, 1998). Because GTE's statements are the subject of an open proceeding before the Commission, we make no conclusion on the merits of GTE's argument at this time. We do note, however, that GTE's argument does not apply here because our analysis shows that SBC and Ameritech would not experience difficulty in expanding out-of-region into each other's territory.

[193] *See WorldCom/MCI Order,* 13 FCC Rcd at 18123, para. 172; *AT&T/TCG Order,* 13 FCC Rcd at 15250, para. 26.

[194] *WorldCom/MCI Order*, 13 FCC Rcd at 18123, para. 172.

[195] *See* Section VI (Analysis of Potential Public Interest Benefits).

Access (MLA) Program.[196] In its MLA program, Ameritech offered local service in a number of out-of-region states to its largest business customers. Ameritech began to implement MLA in 1997. As of February 2, 1999, Ameritech had negotiated interconnection agreements and was certificated to provide local service as a reseller and/or facilities-based carrier in three SBC states – California, Missouri, and Texas.[197] Ameritech asserts that it cancelled the program in June 1998 because it was unable to win customers.[198] The Commission nevertheless agrees with the commenters that argue that Ameritech is a significant potential entrant in the larger business markets in California, Missouri, and Texas.[199] We base this conclusion on our analysis of the ability and incentive of Ameritech to expand out-of-region to serve larger business. The MLA program provides evidence of the incentives of Ameritech to expand out-of-region, if not the ability to do so.

91. Although both SBC and Ameritech are significant market participants in the larger business market for local exchange and exchange access services, unlike in the mass market for local exchange and exchange access services, a large number of other firms may have similar capabilities and incentives expanding out-of-region to serve larger business customers.[200] As we have noted, the larger business market for local exchange and exchange access services differs from the mass market.[201] Larger business customers in general tend to be more sophisticated and knowledgeable purchasers of telecommunications services than mass market customers. A significant difference between the mass market for local services and the larger business market for local services is that larger business customer purchases are not limited to a single local metropolitan geographic area; rather, they purchase simultaneously in numerous local markets. Ameritech's MLA program and the Applicants' National-Local Strategy are examples of how larger business customers' purchasing patterns are targeted by following larger business customers out-of-region. Finally, broad-based brand name recognition and mass

---

196 *See* Appendix B (Summary of Confidential Information and Conclusions).

197 *See id.*

198 This assertion seems to contradict Ameritech's own documents showing that Ameritech continued to market MLA and expend resources after the merger. *See* Appendix B (Summary of Confidential Information and Conclusions). We find it unnecessary here to reach a conclusion on the fate of the MLA program, as we do not base our conclusions on the success or failure of the MLA program alone.

199 *See* Appendix B (Summary of Confidential Information and Conclusions); *See also* Competition Policy Institute Nov. 16 Comments at 6; CFA Oct. 15 Comments at 20; MCI WorldCom Oct. 15 Comments at 3; Sprint Oct. 15 Petition at 8-9, Decl. of Stanley M. Besen, Padmanabhan Srinagesh & John R. Woodbury at 49-51; Telecommunications Resellers Ass'n Oct. 15 Comments at 83.

200 The list of market participants with the capabilities and incentives to provide local exchange services to larger business customers includes the largest interexchange carriers.

201 *See* Section V.B.2.b) (Relevant Markets). *See also WorldCom/MCI Order*, 13 FCC Rcd 18119, para. 164; *AT&T/TCG Order*, 13 FCC Rcd 15257, para. 38. AT&T/TCG, with its combination of AT&T's capital resources and existing base of business long distance customers along with TCG's local exchange facilities and existing base of business local exchange customers, is a significant competitor in the local market for larger business customers. In a similar vein, MCI/WorldCom, with its combination of MCI's business customer base and local facilities along with WorldCom's competitive LEC assets (including Brooks Fiber and MFS), is also a significant competitor in the larger business local exchange market. Sprint has expressed an intention to serve this market with its ION offering, building off its own base of larger business customers. Other firms that are, or could soon become, significant market participants include NEXTLINK, e.spire, and WinStar.

advertising are less important in attracting larger business customers.[202] As a result, many more firms are entering the larger business market successfully than are entering the mass market for local exchange services, and the merger is therefore less likely to have adverse public interest effects in the larger business market for local services.[203]

### d) Analysis of Merger's Effects

92. We seek to determine whether the merger of Ameritech and SBC is likely to cause a public interest harm by reducing the level of competition in any relevant local market. One of the major purposes of the Act, that we seek here to further, is to lower the entry barriers that gave incumbent LECs monopoly control over the local services offered to customers in their regions. The Act's goal was to introduce competition in these markets to the ultimate benefit of customers, both as entrants attempted to win consumers' business with lower prices and improved services, and as incumbents were forced in turn to respond to the entrants or lose customers. The realization of this goal is jeopardized if the incumbent and one of the most significant competitors in its region choose to merge instead of compete. This is true even if this competitor has not yet entered during the transitional period while entry barriers are being eliminated, as the merger will eliminate future entry and any corresponding competitive restraint this would place on the incumbent.

93. In the instant merger analysis, we conclude above that both SBC and Ameritech have the capabilities and incentives to expand into the mass market for local exchange and exchange access services in geographic markets adjacent to their own regions or ones in which they have a cellular presence. SBC and Ameritech are thus among the most significant potential competitors in these markets in each other's regions. Therefore, the merger of SBC and Ameritech would lessen competition in these markets, resulting in a potential public interest harm. In the larger business market for local exchange and exchange access services, we conclude above that SBC and Ameritech are among a significant number of actual and potential competitors in each other's regions. Therefore, the merger would be unlikely to lessen competition in these markets and we find little corresponding public interest harm.

#### (1) Competitive Effects on Mass Market Local Services

94. *St. Louis*. In our analysis of the ability and incentives of incumbent LECs to expand out-of-region, we focus on the advantages that incumbent LECs have when expanding into adjacent regions or regions in which they already have a cellular presence. In St. Louis, Ameritech enjoys both advantages. Indeed, as discussed above, Ameritech did have plans to enter the St. Louis market. We therefore focus our discussion first on the St. Louis market, before turning to other general regions.

---

[202] *See AT&T/TCG Order*, 13 FCC Rcd at 15257, para. 39; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53

[203] *See* SBC/Ameritech July 24 Application, Description of the Transaction at 66.

95. We find that the merger will result in the elimination of Ameritech as a significant market participant in the mass market for local services in St. Louis. Consequently, the proposed merger will reduce the level of competition in this market, and thereby result in a significant public interest harm. As discussed above, we base this conclusion on the following. First, until the merger was negotiated, Ameritech was entering the mass market for local services in St. Louis. Second, we find that Ameritech was among the most significant competitors to SBC in St. Louis. We base this finding on our conclusion that Ameritech, as an incumbent LEC, has the operational experience to be able to offer local exchange services on a large-scale in out-of-region markets. In addition, Ameritech had a number of advantages for entering St. Louis, including its St. Louis wireless customer base and brand reputation, and its adjacency to St. Louis. The only other most significant potential market participants in the mass market for local services in St. Louis are the major interexchange carriers, with their ability to capitalize on their brand name and existing customer base.[204] We conclude, therefore, that the merger will eliminate Ameritech as one of a very limited number of most significant market participants in the mass market for local services in St. Louis, and thereby will result in a public interest harm.

96. We therefore concur with DOJ's conclusions that Ameritech planned to begin offering wireline local exchange services to mass market customers in St. Louis prior to the merger announcement, as well as the absence of other firms with similar intentions.[205] Nevertheless, we conclude that the divestiture of Ameritech's cellular assets required by DOJ, standing alone, does not mitigate the public interest harms outlined in this section.[206] As discussed above, the public interest standard that governs the Commission's review is broader than the antitrust analysis undertaken by the DOJ. In particular, we find that the merger may delay the future development of competition or lessen its eventual impact, contrary to the intention of the 1996 Act. Specifically, we find that the merger will result in a significant public interest harm in the provision of local exchange services to the mass market in St. Louis and elsewhere, despite the divestiture of Ameritech's cellular assets.

97. We reach this conclusion based on our analysis of the capabilities, incentives, and intentions of Ameritech to expand into St. Louis, and our corresponding finding that GTE Consumer Services Incorporated (GCSI), the purchaser of Ameritech's St. Louis cellular

---

204 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20024, para. 70.

205 *See* Appendix B (Summary of Confidential Information and Conclusions). The DOJ complaint states: "[A]meritech planned, prior to its announcement of its agreement to be acquired by SBC, to provide local exchange and long distance telephone services in SBC's local telephone service area, primarily by selling bundled packages of such services and its cellular mobile telephone service to existing Ameritech residential cellular customers. There is no alternative source of such a bundled product in the St. Louis area at present." DOJ Complaint at para. 21.

206 As noted by DOJ: "The antitrust Division's suit was filed under Section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition, and reflects the Division's view about the antitrust issues raised by the proposed merger. Other governments agencies, including the Federal Communications Commission and the public utility commissions of Illinois, Indiana, and Ohio, are also reviewing the SBC/Ameritech transactions under the laws which those agencies enforce." DOJ March 23 Press Release at 2.

assets[207] is not likely to be as significant a competitor to SBC's residential wireline services as was Ameritech. First, we note that GCSI meets the requirement specified in DOJ's Proposed Final Judgment, if it "has the capability of competing effectively in the provision of local exchange telecommunications services and long distance telecommunications service in the St Louis Area."[208] This specific language clearly indicates that DOJ only wishes to require that GCSI demonstrate the *capability* to use these assets to provide local services in St. Louis, but not the specific *intention* to so use them. We note that although GCSI has the capability of providing local services in the St Louis Area, based on the record before us, it lacks the adjacency, incentive and stated intention to provide wireline local exchange services in St. Louis that in combination with its brand name recognition gave Ameritech its advantages in entering the St. Louis market.[209] It is therefore unlikely that GCSI could demonstrate the same incentive, and intention to provide wireline local exchange services for mass market customers in St. Louis as Ameritech. We therefore conclude that the merger leads to a public interest harm in the St. Louis market despite the divestiture of Ameritech's cellular assets, although divestiture to a firm with the ability to extend the wireless business to a genuine wireline threat does mitigate the significance of the harm.

98. *Other Regions*. We further find that, as elaborated in Appendix B, the fact that SBC had no current plans to enter any mass market for local exchange and exchange access services out-of-region, and the fact that Ameritech's plans focused on St. Louis, do not preclude a finding that each was a significant potential mass market participant in other regions. We base this finding on the transitional market analysis articulated in the *Bell Atlantic/NYNEX Order*, stating that in transitional markets such as the local markets examined here, the Commission may consider future entry in its analysis of the competitive effects of a merger.[210] As discussed in Appendix B, Ameritech was expanding elsewhere into SBC's region as part of its MLA program. Combining the MLA foothold in the larger business market in these regions with the benefits of Ameritech's experience as an incumbent LEC, along with additional experience that it would have accrued as a competitive LEC in St. Louis, we find that Ameritech had the capabilities and incentives to further expand into the mass market for local services in SBC's

---

[207] *See In re Applications of Ameritech Corporation, Transferor, and GTE Consumer Services, Inc., Transferee, for Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, DA 99-1677, 1999 W.L. 635,724 (WTB 1999).

[208] *See* Proposed Final Judgment at 3.

[209] We note that GCSI has not stated it has any specific plans to enter the mass market for local services in St. Louis. In a Press Release announcing the proposed acquisition of Ameritech's wireless properties, GTE Chairman and CEO Charles R. Lee stated that the purchase would "facilitate expansion into the local phone markets in key Midwest cities such as Chicago and St. Louis," however he mentioned no immediate specific plans to do so. *See* GTE Press Release at 2. In GCSI's application to the Commission for transfer of control of Ameritech's cellular licenses, there is similarly no mention of plans to use these wireless assets as a launching pad for offering wireline services; rather, there is simply a mention that wireless and wireline services will be made available through one-stop shopping "where an overlap exists between GTE's local exchange offerings and the Ameritech cellular properties." There is no such overlap in St. Louis. *See* Application of GTE Corporation for Transfer of Control of Radio Station Authorizations held by Ameritech, filed May 3, 1999 at 8-9.

[210] *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20020, para. 60; *WorldCom/MCI Order*, 13 FCC Rcd at 18037-38, paras. 19-20.

region. The divestiture of Ameritech's cellular assets in St. Louis does not provide any assurance that the purchaser will expand beyond St. Louis as Ameritech was likely to have done. Although SBC would not have adjacency benefits in most of Ameritech's region, combining its experience as an incumbent LEC with its cellular assets, notably in Chicago, but also elsewhere in Ameritech's region, we find that SBC had the capabilities and incentives to expand into the mass market for local services in Ameritech's region.

99. Therefore, we find that the merger of SBC and Ameritech results in the loss of a most significant potential competitor in the provision of mass market local exchange services in portions of each other's regions, resulting in a potential public interest harm. The harm is significant because both firms are among a very few that are poised on the edge of an entrenched monopolist, with genuine abilities to challenge that monopolist. These harms, although real and substantial, nevertheless may not be enough, in and of themselves, to justify prohibiting the merger. Neither firm was likely to enter most of the other's territory. Throughout both territories, at least three interexchange carriers are also significant actual or potential entrants. The divestiture of Ameritech's wireless St. Louis operation to GTE somewhat mitigates the merger's effects in that city. Were the loss of each firm's entry into the other's territory the only public interest harm produced by this merger, the overall balance would be much closer.

#### (2) Effects on Larger Business Market

100. With respect to the provision of local exchange access services to larger business customers, we find that, absent the merger, Ameritech is likely to have followed a number of its large business customers in a number of out-of-region states in SBC's territory, as documented by Ameritech's plans to offer local exchange services via its MLA program, and that SBC had the capabilities and incentives to expand out-of-region in a similar fashion, despite the absence of concrete plans.[211] We also find that there are a number of significant competitors equally competitive with SBC and Ameritech in these markets. Therefore, although SBC and Ameritech are significant market participants, we do not find that their elimination, as a result of the merger, would substantially frustrate the goals of the Act and harm the public interest in the provision of local exchange and exchange access services sold to larger business customers.[212]

### C. Comparative Practices Analysis

101. In this section, we analyze the effect of the proposed merger on the ability of regulators and competitors to use comparative analyses of the practices of similarly-situated independent incumbent LECs to implement the Communications Act in an effective, yet minimally intrusive manner. Such comparative practices analyses, referred to by some

---

211 *See* Appendix B (Summary of Confidential Information and Conclusions).

212 *See WorldCom/MCI Order*, 13 FCC Rcd at 18074, para. 86; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20022, para. 65. We note, further, that this conclusion undermines the Applicants' argument that a potential public interest benefit would result post-merger from Applicants following their larger business customers out-of-region as a result of their National Local Strategy. A number of firms, including SBC and Ameritech, are already providing or could provide local exchange and exchange access services to these customers.

commenters as "benchmarking," provide valuable information regarding the incumbents' networks to regulators and competitors seeking, in particular, to promote and enforce the market-opening measures required by the 1996 Act and the rapid deployment of advanced services. Without the use of this tool, regulators would be forced, contrary to the 1996 Act and similar state laws, to engage in less efficient, more intrusive regulatory intervention in order to promote competition and secure quality service at reasonable rates for customers. We find that the proposed merger of SBC and Ameritech would pose a significant harm to the public interest by severely handicapping the ability of regulators and competitors to use comparative practices analysis as a critical, and minimally-intrusive, tool for achieving the Communications Act's objectives.

102. The Commission's public interest test considers, among other things, "whether the merger . . . would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy."[213] In past incumbent LEC mergers, the Commission has recognized that the declining number of independently-owned major incumbent LECs limits the effectiveness of benchmarking for regulators in carrying out the goals of the Communications Act.[214] In the *Bell Atlantic/NYNEX Order* in particular, the Commission observed that, as the number of independent large incumbent LECs declines, regulators and competitors lose the ability to compare policies and performance among major incumbents that have made divergent management or strategic choices.[215] Consequently, in allowing the Bell Atlantic/NYNEX merger, the Commission expressly cautioned that "further reductions in the number of Bell Companies or comparable incumbent LECs would present serious public interest concerns."[216] The Commission went on to warn that "future applicants bear an additional burden in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity."[217] The Applicants have not overcome that burden.

103. Following the concerns expressed in the *Bell Atlantic/NYNEX Order,* and SBC's prior acquisitions of Pacific Telesis and SNET, we must consider the effect that a further reduction in the number of large incumbent LECs would have on the ability of regulators and competitors to use comparative practices analyses as a deregulatory means to advance the pro-competitive goals of the Communications Act. We find, as the Commission concluded in the

---

213 *AT&T/TCI Order*, 14 FCC Rcd at 3169, para. 14.

214 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, para. 16; *SBC/SNET Order*, 13 FCC Rcd at 21292, para. 21 ("We remain concerned about the consolidation among large LECs as a general matter."). *See also SBC/PacTel Order*, 12 FCC Rcd at 2624, para. 32.

215 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, para. 16. The Commission specifically found that "[m]ergers between incumbent LECs will likely reduce experimentation and diversity of viewpoints in the process of opening markets to competition." *Id.* at 20060, para. 152.

216 *Id.* at 20062-63, para. 156. The Commission stressed that further reductions in the number of RBOCs "become more and more problematic as the potential for coordinated behavior increases and the impact of individual company actions on our aggregate measures of the industry's performance grows." *Id.*

217 *Id.* at 19994, 20061, paras. 16, 153.

*Bell Atlantic/NYNEX Order*,[218] that the major incumbent LECs (RBOCs and GTE), because they are of similar size and face similar statutory obligations and market conditions, remain uniquely valuable benchmarks for assessing each other's performance. It follows that a reduction in the few remaining major incumbent LECs would restrict the flow of information to regulators and competitors that otherwise could be used to promote innovative market-opening solutions or to identify and curtail unreasonable and discriminatory behavior.

104. As discussed in greater detail below, we find that the proposed merger's elimination of Ameritech as an independent major incumbent LEC will significantly impede the ability of this Commission, state regulators and competitors to use comparative practices analyses to discover beneficial, pro-competitive approaches to open telecommunications markets to competition and to promote rapid deployment of advanced services. More specifically, the loss of Ameritech as an independent source of strategic decisions and experimentation, and the increased incentive for the merged entity to reduce autonomy at the local operating company level as a result of the merger, would severely restrict the diversity that regulators and competitors otherwise could observe and, where pro-competitive, endorse. By further reducing the number of major incumbent LECs, the merger also increases the risk that the remaining firms will collude, either explicitly or tacitly, to conceal information and thereby hinder regulators' and competitors' benchmarking efforts. We therefore conclude that the proposed merger of SBC and Ameritech would impede the ability of regulators and competitors to make effective benchmark comparisons, which would force more intrusive, more costly, and less effective regulatory measures contrary to the 1996 Act's deregulatory aims and the interests of both the regulated firms and taxpayers. The loss of this more efficient method of oversight can only serve to further entrench the large incumbent LEC's substantial market power.

105. Our analysis of the effect on comparative practices analysis of SBC's acquisition of Ameritech discusses: (1) the need for comparative practices analyses to offset the informational disadvantage of regulators and competitors; (2) the impact of a reduction in the number of comparable firms on benchmarking's effectiveness; (3) examples of the use of comparative practices analysis by regulators and competitors to evaluate practices of the large incumbent LECs both prior to and following the 1996 Act; (4) the adverse impact of the proposed SBC/Ameritech merger on the effectiveness of comparative practices analyses; and (5) the present inadequacy of other alternatives to large incumbent LEC benchmarks.

### 1. Need for Comparative Practices Analyses

106. For regulators and competitors, comparative analyses of the practices and approaches of a variety of similarly situated incumbent LECs can render valuable information regarding network features, capabilities and costs. The 1996 Act requires regulators to oversee the opening of local telecommunications markets to competition and to promote rapid deployment of advanced services under circumstances in which regulators possess far less accurate and less complete information than incumbent LECs about the capabilities and

[218] *Id.* at 19994, para. 16.

constraints of existing networks.[219] Without such information, regulators and competitors may not be able to make informed decisions regarding the feasibility and costs of certain interconnection or access arrangements, particularly when disputes arise over the introduction of new, unproven technologies or services.[220] The incumbent LEC's superior knowledge also gives it a decided advantage over competitors in negotiating prices, terms and conditions for interconnection or network access.[221]

107. In addition, incumbent LECs, which are both competitors and suppliers to new entrants, have strong economic incentive to preserve their traditional monopolies over local telephone service and to resist the introduction of competition that is required by the 1996 Act.[222] More specifically, an incumbent LEC has an incentive to: (1) delay interconnection negotiations and resolution of interconnection disputes; (2) limit both the methods and points of interconnection and the facilities and services to which entrants are provided access; (3) raise entrants' costs by charging high prices for interconnection, network elements and services, and by delaying the provisioning of, and degrading the quality of, the interconnection, services, and elements it provides.[223] An incumbent LEC has similar, and probably greater, incentive to deny special accommodations required by competitive LECs seeking to offer innovative advanced

---

219 *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, 15606, at para. 205 (1996) (*Local Competition Order*) (requiring incumbent LECs to prove to the appropriate state commission that interconnection or access at a particular point is not technically feasible, given that "[i]ncumbent LECs possess the information necessary to assess technical feasibility of interconnecting to particular LEC facilities."). *See also* Sprint Oct. 15 Petition, Farrell and Mitchell Decl., Att. C at 2-3, 7 (observing that a firm will be better informed about its economic costs, its ability to improve service quality or reduce delivery intervals, and other "softer" qualitative indicators such as access to unbundled network elements, provisioning and ordering practices, quality characteristics and opportunities for innovation).

220 *See* Sprint Oct. 15 Petition at 26-27 (discussing how innovative technologies, such as Sprint ION, may require access to new and additional capabilities in the local exchange network, which translates into a need for competitors to acquire incumbent LEC inputs in nontraditional forms or in new price configurations).

221 *See Local Competition Order*, 11 FCC Rcd at 15510, para. 15 (discussing Congress's recognition of the superior bargaining power of incumbent LECs in negotiations with new entrants).

222 *See, e.g., Local Competition Order*, at 15508-09, paras. 10-11 (recognizing that an incumbent LEC, with its economies of density, connectivity and scale, has "little economic incentive to assist new entrants in their efforts to secure a greater share of that market.").

223 *See, e.g., id.*; *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539, 17542-43, 17546, paras. 3-4, 13-14 (1996) (*Accounting Safeguards Order*); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21910, 21912-13, 21914, 22002-04, paras. 6, 11-13, 16, 206-08 (1996) (*Non-Accounting Safeguards Order*) (discussing a BOC's incentive to degrade services and facilities furnished to rivals of its affiliates and seeking ways to ensure that a BOC cannot use its control over local exchange bottlenecks to undermine competition in new markets that it enters); *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, CC Docket No. 98-147, *et al.*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24023, 24035, paras. 21, 47-48 (1998) (*Advanced Services Order and NPRM*) (noting Congress's intent to open local markets to competition by reducing inherent economic and operational advantages possessed by incumbents, particularly with respect to interconnection, access to unbundled network elements and collocation).

services that the incumbent may not even offer.[224] As noted at the outset, this view of the incumbent LECs' incentives and abilities is the fundamental postulate of the basic cornerstones of modern telecommunications law – the MFJ and the 1996 Act.

108. Given these incentives to resist competitive entry, independent incumbent LECs, absent collusion, are likely to adopt different defensive strategies to forestall competitive entry, and each particular strategy will reveal information to regulators and competitors. One incumbent LEC may claim, for example, that a particular form of interconnection is infeasible, while a second may resist the unbundling of a particular network element, and a third may oppose the collocation of specific types of equipment within its central offices. In such situations, the behavior of other major incumbent LECs can be used as benchmarks to evaluate the outlying incumbent's claims. Competitors, in negotiating and implementing access and interconnection arrangements, could point to the conduct of one incumbent to rebut another incumbent's assertion that a particular service is not feasible or must be structured or priced in a particular manner. Comparative practices analysis does not require this Commission to assume the more expensive and intrusive posture of imposing arduous reporting requirements and dictating how networks should be organized and operated. Comparing the practices of a large number of similarly-situated incumbents provides a minimally-intrusive means for regulators and competitors to counterbalance the incumbents' superior knowledge of the possible technical arrangements for collocation, unbundled access, and interconnection, as well as the costs associated with such arrangements.

109. The ability to analyze a wide variety of approaches among the major incumbent LECs is especially crucial for regulators and competitors in implementing the provisions of the 1996 Act that mandate competitive access to facilities and services. As regulators seek to open local telecommunications markets and promote advanced services deployment using deregulatory means, they benefit greatly from observing diverse strategic decisions and experimentation among the incumbents.[225] The Applicants themselves acknowledge that the introduction of local competition has "both accelerated and been accompanied by rapid technological developments."[226] Comparative practices analyses are perhaps the regulators' and

---

[224] *See, e.g., Non-Accounting Safeguards Order*, 11 FCC Rcd at 22004, para. 211 (noting that a BOC's purposeful delay in implementing a competitor's request pertaining to an innovative new service would violate sections 201(a) and 272(c)(1) of the Communications Act). *See also* Section V.D.2.a) (Advanced Services) (discussing the Applicants' increased incentives and capabilities for blocking competition, particularly with respect to new services).

[225] Accordingly, we reject the Applicants' contention that benchmarking will cease to play a role during the post-1996 Act transition to full competition. *See* Letter from Todd F. Silbergeld, SBC Telecommunications, Inc., to Magalie Roman Salas, FCC, CC Docket No. 98-141 (filed March 26, 1999), Att. "Supplemental Memorandum Regarding Regulatory Benchmarking Issues," March 25, 1999 (SBC/Ameritech Mar. 25 Supplemental Memo) at 19. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, para. 16 ("During the transition to competition it is critical that the Commission be able effectively to establish and enforce its pro-competitive rules and policies."). Even the Applicants seem to agree that benchmarking has been particularly useful in implementing section 251. *See* SBC/Ameritech Nov. 16 Reply Comments at 62 (commenting that "the vast majority of the benchmarks being developed under section 251 are best practices or parity benchmarks, not industry averages.").

[226] SBC/Ameritech Mar. 25 Supplemental Memo at 20.

competitors' best means of staying abreast of such rapid technological advances, particularly in assessing the technical feasibility of novel access and interconnection configurations vital for the provision of new services and technologies.

110. In analyzing comparative practices, regulators and competitors generally use two broad methods of comparison – "best-practices" and "average-practices" benchmarking. It is not unusual, however, for comparative practices analyses to involve a combination of these approaches.

111. *Best-Practices.* Under "best-practices" benchmarking, a regulator compares behavior across a group of similarly situated, independent firms in order to identify the best practice employed by a firm, or subset of firms.[227] When individual incumbent LECs adopt a variety of techniques or technologies to provide a particular service, regulators and competitors can compare the costs and benefits of each technique to arrive at a "best practice," which presumptively could be promoted or required of all incumbents. If one or two incumbent LECs, for example, offered requesting carriers cageless collocation, this would call into question the claims of other incumbent LECs that cageless collocation threatened the reliability of the network.[228] Alternatively, if several similarly-situated incumbent LECs provide widely varying estimates of the cost of providing a certain service, then the low cost estimate would call into question the accuracy of the higher cost estimates.

112. *Average-Practices.* Under "average-practices" benchmarking, a regulator gathers data from a number of firms in order to identify the prevailing standard or to calculate the average, which then could be used as a benchmark against which to evaluate an individual LEC's performance. Substantial deviation from the benchmark average can assist regulators and competitors in detecting substandard, and potentially unreasonable, behavior, such as poor service quality or unreasonable costs.[229] Variations of this form of comparative practices analysis also can be used to monitor service quality or to detect unreasonable or discriminatory costs or practices. The Commission's calculation of the X-factor based on industry-wide increases in productivity, which was then applied to all "Price Cap LECs," is another use of average-practices benchmarking.[230] To be effective, however, average-practices benchmarking requires data from a large number of independent, similarly situated incumbent LECs, none of

---

227 Similarly, evaluating the practices of several firms may lead to the identification of a "worst practice" if one firm's practice stands in poor contrast to that of other firms.

228 *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, 4784-85, at para. 42, n.100, n. 102 (1999) (*Advanced Services Further Notice*) (noting U.S. WEST's provision of cageless collocation in contrast to the security concerns expressed by Bell Atlantic, SBC and GTE).

229 *See* Peter Huber, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry*, at 3.24, 3.54-3.55 ("Benchmarking one LEC's performance against another in the post-divestiture marketplace has proved an effective regulatory tool. Laggard or eccentric LEC performance stands out when eight large holding companies line up for periodic regulatory inspection.").

230 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20060, para. 150 (discussing the use of benchmarking in setting the X-factor, or the estimated annual rate of productivity gain used to adjust the price index of firms subject to price cap regulation).

which is large enough to dominate, or skew, the aggregate data. In such a situation, an individual LEC's action would have little impact on the average benchmark, and an incumbent LEC would have no incentive to deviate from its individually optimal behavior in order to affect that average benchmark.

113. Absent the ability to benchmark among major independent incumbent LECs, this Commission and state regulators would have no choice but to engage in highly intrusive regulatory practices, such as investigating the challenged conduct directly and at substantial cost to make an assessment regarding its feasibility or reasonableness.[231] The increased need for such direct regulation would not only be more costly, but it would clash with the deregulatory goals of the 1996 Act.[232] Furthermore, these more intrusive and costly regulatory alternatives are unlikely to be as effective as comparative practices analysis in implementing the pro-competitive mandates of the 1996 Act, given the rapid evolution of technology, the incumbent LECs' informational advantage and their incentive to conceal such information.

### 2. Effect of Reduction in Number of Benchmarks

114. In order to render a variety of policies and practices for regulators and competitors to observe and analyze, comparative practices analysis requires a large number of comparable independent sources of observation. For this reason, mergers between benchmark firms significantly weaken the effectiveness of this tool. Removing a benchmark firm through a merger reduces the independence of the sources of observation at three levels: (a) the holding company level, as policies of the acquired firm that conflict with those of the acquiring firm are eliminated; (b) the local operating company level, as the holding company's incentive to impose uniform practices throughout its expanded region increases; and (c) the industry level, as the incentives and capabilities of the few remaining major incumbent LECs to coordinate their behavior increase. In addition, the loss of an independent incumbent LEC will have a greater impact on reducing benchmarking's effectiveness the larger the region of the combined entity and the smaller the number of similarly-situated firms remaining following the merger.

#### a) Effect at Holding Company Level

115. A merger of two large incumbent LECs obviously eliminates an independent source of observation at the holding company level. The combined entity is unlikely to continue with two sets of policies and practices where the dual policies conflict with one another. Instead, it is likely to eliminate any divergent approaches in favor of a standard policy (which may represent a choice between the two firms' positions or a compromise). The acquiring firm has a particularly strong incentive to eliminate conflicting policies of the acquired firm that would

---

231 As Sprint points out, without benchmarking, the Commission would have to employ far more intrusive measures, including document and *in personae* subpoenas, more after-the-fact complaint adjudication, or on-the record hearings. Sprint Oct. 15 Petition at 39.

232 *See id.* at 40.

jeopardize its chosen strategy to resist competitive entry.[233] Consequently, as the Commission explained in the *Bell Atlantic/NYNEX Order*, the result of the merger may be a reduction in the level of experimentation and variety of approaches observable to regulators and competitors.[234]

116. When only a few similarly-situated benchmark firms remain, the harms to benchmarking increase more than proportionately with each successive loss of a firm as an independent source of observation.[235] As the number of independent sources of observation declines, there is less likelihood that a significant "maverick" will emerge to undertake a strategic or management decision that departs from the other incumbents, and that may establish a best practice in the industry. Moreover, the best observed practice is likely to become worse simply because there are fewer observations. Finally, as the number of independent sources of observation decreases, deviations from average practices can be identified less confidently as unreasonable and punishable.

117. Having a significant number of independent points of observation is especially crucial for regulators and competitors in decisions regarding new services and innovative technologies. Such decisions are likely to entail forecasting the expected benefits, costs, timing, and problems associated with the provision and maintenance of such services and innovations. Although it is impossible to make such predictions with certainty, the existence of numerous major incumbent LECs increases the information available to regulators in evaluating whether or when to require the new service or innovation, and in setting rates. Conversely, having few major incumbent LECs to serve as independent points of observation can undermine the credibility of such determinations.

### b) Effect at Operating Company Level

118. A merger of two holding companies also is likely to reduce the relative autonomy of their local operating companies and hence the overall level of experimentation and diversity for decisions that were made at the operating company level. Holding companies typically impose certain constraints on their operating companies. Accordingly, when two holding companies with distinct policies merge and adopt one common set of policies, the decisions made by the operating companies of the acquired holding company will become more closely correlated with the decisions made by the operating companies of the acquiring holding company. Furthermore, the expansion in the combined entity's service region results in a greater incentive to shift more decisions from the operating company level to the holding company level.

119. As a holding company's size increases, the cost it incurs when one of its operating companies' practices is used as a benchmark against the rest of the company also increases. For

---

233 *See* State Attorneys General Apr. 27 *Ex Parte* at 20 ("A merger enables the surviving RBOC to reduce the possibility that the independent decisions of the other RBOCs would undercut the strategy it has adopted to respond to its market-opening obligations.").

234 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20060-62, paras. 152-54.

235 *See id.* at 20062-63, para. 156.

example, if each of the merging firms previously had five local operating companies, then each of these holding companies would have been concerned only with the cost of adopting a benchmark practice for its four other operating companies. Following the merger, however, the holding company would have to consider the cost of adopting this benchmark practice for a total of nine other operating companies. Accordingly, as a holding company acquires more operating companies and its service region expands, it has an increased incentive to ensure that its operating companies' policies are consistent with those of the holding company.

120. Where a merger creates an incumbent LEC of sufficient size to dominate the setting of industry averages and standard practices, which are based on data from operating companies, the merged firm acquires an incentive to impose uniform practices in order to influence or set the *de facto* average benchmark. An incumbent LEC with few operating companies, for example, may allow its local operating companies to set the non-recurring charge (NRC) associated with cutting over a loop, because the data from its operating companies will have negligible impact on the industry average. If, however, as a result of a merger, the holding company controlled a large percentage of the nation's local loops, then it would have a strong incentive to establish a uniform NRC in order to influence the industry average.[236] Alternatively, a holding company that knew that a maverick operating company outside its territory was developing a new billing and collection arrangement that would likely become a best-practice benchmark would have limited incentive to prevent its own operating companies from employing a variety of billing and collection arrangements, for the differing arrangements would have little effect on the ultimate benchmark. If, however, a merger brought the maverick operating company under the holding company's control, the holding company would be able to influence the benchmark by requiring all its operating companies (including the maverick) to adopt the billing and collection arrangement that it deemed most advantageous. The result, again, would be a loss of independent sources of observation for regulators and competitors seeking to use comparative practices analyses to promote competition and rapid deployment of advanced services.

### c) Effect at Industry Level

121. A reduction in the number of independently-owned major incumbent LECs as a result of a merger increases the likelihood of coordination, either tacit or explicit, among the remaining firms in the industry for the purposes of reducing the effectiveness of comparative practices analyses. As general antitrust principles indicate, collusion is more likely to occur

---

[236] *See e.g.*, Letter from Lisa R. Youngers, MCI WorldCom, to Robert Atkinson and Thomas Krattenmaker, FCC, May 13, 1999 (MCI WorldCom May 13 *Ex Parte*), at 3 (observing that, as part of the Bell Atlantic/NYNEX merger conditions, Bell Atlantic submitted optional payment plans for non-recurring charges in all of its states with a uniform assumed anticipated bad debt figure of 2 percent, despite figures that MCI WorldCom calculated using ARMIS data and the Hatfield Model that ranged from .31 to .89 percent depending upon the individual operating company).

where only a few participants comprise a market and entry is relatively difficult.[237] This is due in part to the fact that, with fewer firms, less potentially divergent interests must be accommodated by the coordinated behavior. On the other hand, with a large number of competitors and low barriers to entry, coordinated behavior is less likely.[238]

122. The Horizontal Merger Guidelines indicate concern that firms may be able to coordinate with respect to price or other product attributes when six equally sized firms compete in an industry.[239] Nonetheless, the ability of firms to coordinate on price is partially mitigated by the fact that, by its very nature, an agreement to maintain price above the competitive level creates an incentive for each of the firms to cheat on the agreement and lower price. By undercutting the agreed-upon price, a firm could earn a higher profit than it would earn if it (along with the others) maintained the agreement. We note that, as the major incumbent LECs do not directly compete on price in the same geographic markets (and, as noted above, would be less likely to do so after the merger), they do not have this incentive to lower price.

123. In the context of comparative practices analysis, we expect that, with respect to coordinating divergent incentives, having fewer benchmark firms would also result in the remaining firms being better able to coordinate their behavior. In this situation, the coordination of behavior could be designed not to raise price, but, rather, to conceal information from regulators and thereby impede regulatory functioning. Unlike competing firms, each of which has a unilateral incentive to cheat on the agreement in order to raise its profits, no such incentive to cheat exists with respect to an agreement, tacit or explicit, to behave in a uniform way to conceal information from a regulator.

124. By reducing the number of benchmark firms, and thereby simplifying coordination of agreements, a merger between major incumbent LECs facilitates agreement among the remaining firms to conceal information to thwart the effectiveness of benchmarking.[240] The remaining firms will find it easier to coordinate the withholding of certain

---

237 *See* F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* 277-315 (3rd Ed., 1990); A. Jacquemin and M. Slade, "Cartels, Collusion, and Horizontal Merger," published in R.Schmalensee and R.D. Willig, *Handbook of Industrial Organization*, Vol. 1 (1989).

238 Applying these principles, the Commission has recognized that the markets for local exchange and exchange access services, traditional monopolies collectively dominated by major regional holding companies, are conducive to coordinated interaction. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20047, para. 122 (concluding "that the risk of coordinated interaction is particularly high in the markets in which Bell Atlantic and NYNEX compete.").

239 This is implied by the fact that when a market's HHI is 1800, the guidelines consider the market to be highly concentrated and mergers between companies with more than 7% market share raise concerns of coordinated and unilateral anti-competitive effects.

240 Because each successive reduction in the number of benchmarks will reduce the utility of comparative practices analyses, there will be some point at which further reduction in benchmark firms renders such comparisons ineffective. As noted above, in the *Horizontal Merger Guidelines*, DOJ set a threshold of market concentration according to an 1800 HHI, or the equivalent of six equally-sized firms. *See Horizontal Merger Guidelines*, at 16 ("Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise."). In such a market, a

types of information and the elimination of divergent practices that regulators and competitors could use in comparative practices analyses. Tacit coordination among fewer major incumbent LECs makes it easier for the remaining firms to agree not to provide a certain type of interconnection or access arrangement in order to prevent regulators and competitors from concluding that such arrangement is feasible because another major incumbent is providing it. Likewise, the remaining firms could agree not to charge a non-recurring charge less than a certain price so as to avoid a regulator's use of a lower threshold to assess reasonableness. In this way, further consolidation among the major incumbent LECs would severely curtail regulators' abilities to constrain any tacit or explicit coordination by these incumbents to impede comparative practices analyses, especially as regulators seek to open the incumbents' markets to competition.

### 3. The Value of Comparative Practices Analyses

125. As illustrated by the examples that follow, courts, federal and state regulators, and competitors have consistently recognized comparative practices analysis as a crucial tool, and have employed such analyses, to set industry standards and policy, detect discriminatory behavior, and promote competition. In the *Bell Atlantic/NYNEX Order*, the Commission noted that federal and state regulators have long recognized benchmarking as a relatively non-intrusive means of implementing pro-competitive policies and rules and of evaluating incumbents' compliance with such requirements.[241]

#### a) Comparative Practices Analyses under the Modified Final Judgment

126. Prior to their recent merger efforts, the RBOCs had been among the most fervent proponents of the use of benchmarking to supplant other more-intrusive forms of regulation.[242] For example, when the RBOCs petitioned for removal of the MFJ's line-of-business restrictions in 1987, each of the then-seven RBOCs argued that lifting the line-of-business restrictions was justified because the performance of one RBOC could be measured against that of the six

---

merger that reduces the number of competing firms from six to five is therefore likely to be challenged as raising serious concern regarding unilateral and coordinated effects. Analogously, using a market which consists not of competing firms but of benchmark firms, reducing the number of benchmark firms from six to five is likely to raise concern with respect to coordinated efforts to defeat benchmarking, which, as noted above, are more likely to succeed here than in competitive markets where each firm faces potential gain from unilateral deviation.

[241] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20058-58a, para. 148 (*citing United States v. Western Elec. Co., Inc.*, 47 Fed. Reg. 7170, 7174-75 (Feb. 17, 1982) (United States Department of Justice, Competitive Impact Statement); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Cir.), *cert. denied*, 510 U.S. 984 (1993)).

[242] *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20058a, para. 149 (*citing*, among other RBOC support, Ameritech Response to Comments on the Report and Recommendations of the United States Concerning the Line of Commerce Restriction, Civil Action No. 82-0192, at 23 (D.D.C Apr. 24, 1987); Ameritech Comments on the Report and Recommendations of the United States Concerning the Line of Business Restrictions, Civil Action No. 82-0192, at 10 (D.D.C. Mar. 13, 1987); SBC Comments on the Report and Recommendations of the United States Concerning the Line of Business Restriction, Civil Action No. 82-0192, at i (D.D. C. Mar. 13, 1987)).

others.[243] Ameritech, for example, asserted that the "division of the local exchange networks among seven independent companies has greatly enhanced the detectability of any monopoly abuse and the effectiveness of regulation."[244] In a subsequent filing, Ameritech, citing "overwhelming evidence that divestiture-created benchmarks are being used effectively by regulators, the DOJ and the industry as safeguards against any potential anticompetitive conduct or regulation abuse," asserted that "[n]o amount of sophistry can suppress the importance of benchmarks."[245] Similarly, SBC contended that, with the creation of seven regional companies as a result of the divestiture, "[t]he FCC can now monitor the rates, performances, and business practices of the seven [RBOCs] to detect potential anticompetitive activities."[246] SBC further asserted that the seven RBOC benchmarks provide "an effective deterrent against even subtle attempts to abuse any advantages that might arise from the ownership of local exchange telecommunications facilities."[247]

127. Federal courts, agreeing with the RBOCs' affirmations of the importance of benchmarking, have also recognized the value of comparative practices analyses among the major incumbent LECs. For example, in considering the information services line-of-business restriction, the D.C. Circuit explained:

---

[243] *See United States v. Western Elec. Co.*, 673 F. Supp. 525, 547-48 (D.D.C. 1987), *aff'd in part, rev'd in part* 900 F.2d 283, *cert. denied,* 498 U.S. 911 (1990), *modified on remand* 767 F.Supp. 308 (D.D.C. 1991), *aff'd* 993 F.2d 1572, *cert. denied*, 510 U.S. 984 (1993).

[244] Sprint Oct. 15 Petition, Farrell and Mitchell Decl., "The Benefits of Benchmarking as Recognized in MFJ Proceedings," at 8 (*quoting United States v. Western Elec. Co.*, Civil Action No. 82-0192, Ameritech Comments on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions, at 10-11 (filed Mar. 13, 1987)). Ameritech included with its March 13, 1987 comments an attachment cataloguing "the widespread and effective use of benchmark comparisons since 1982" by the Commission, DOJ, the courts, and the private sector, which is attached as an Exhibit to the Farrell and Mitchell Declaration. In response to Ameritech's and SBC's prior support of benchmarking, SBC and Ameritech claim in their joint reply comments in this proceeding that they "advocated the use of benchmarks when it was economically rational to rely on such data." SBC/Ameritech Nov. 16 Reply Comments at 61 n.196.

[245] Sprint Oct. 15 Petition, Farrell and Mitchell Decl., "The Benefits of Benchmarking as Recognized in MFJ Proceedings," at 8-9 (*quoting United States v. Western Elec. Co.*, Civil Action No. 82-0192, Ameritech's Response to Comments on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions, at 23 (filed April 24, 1987)). *See also United States v. Western Elec. Co.*, Civil Action No. 82-0192, Ameritech Comments on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions, Att. A at 10-11 (filed Mar. 13, 1987) (stating that the use of benchmark comparisons, on large items and small items, "has become a standard practice of the regional companies' customers and competitors, as well as the FCC and the Department of Justice.").

[246] Sprint Oct. 15 Petition, Farrell and Mitchell Decl., "The Benefits of Benchmarking as Recognized in MFJ Proceedings," at 9 (*quoting United States v. Western Elec. Co.*, Civil Action No. 82-0192, Comments of Southwestern Bell Corporation on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions, at i, 9-10 (filed Mar. 13, 1987)).

[247] *Id.* (*quoting United States v. Western Elec. Co.*, Civil Action No. 82-0192, Comments of Southwestern Bell Corporation on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions, at ii (filed Mar. 13, 1987). *See also Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20058a-59, para. 149 (citing other RBOCs' support of the use of benchmarking by the Commission, DOJ and the courts).